

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Jackson February 5, 2008

STATE OF TENNESSEE v. CHRISTINE H. OSBORNE

Appeal from the Criminal Court for Wilson County
No. 04-1142 J.O. Bond, Judge

No. M2006-01301-CCA-R3-CD - Filed April 23, 2008

The defendant, Christine Osborne, was convicted of attempted aggravated child neglect, a Class C felony, by a Wilson County Criminal Court jury. See T.C.A. §§ 39-12-101 (attempt); 39-15-402 (2004) (amended 2005) (aggravated child neglect); 39-15-401 (2004) (amended 2005, 2006) (child neglect). The defendant was sentenced to six years in the Department of Correction as a Range I, standard offender. In this appeal, the defendant challenges the sentence imposed. We hold that the trial court erred in sentencing the defendant, and pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), we modify the defendant's sentence to a term of three years and six months.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Modified

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Adam Wilding Parrish, Lebanon, Tennessee, for the appellant, Christine H. Osborne.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Howard Lee Chambers and Jason Lee Lawson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant was tried with her husband, James C. Osborne, III, relative to their conduct toward the defendant's mentally retarded stepson, who is Mr. Osborne's son. The evidence showed that the victim, who was fifteen years old at the time of the offenses, was chained to a bed in the home in which he lived with the defendants for long periods of time. The victim was also malnourished, weighing in the range of forty-nine to sixty pounds and measuring fifty-three inches tall. The victim's mistreatment came to light when the defendant's sister, who had recently been living in the Osborne home with her boyfriend and five children, reported the conditions to the Department of Children's Services.

The defendant was a homemaker and was the primary caretaker of the victim as well as her three children fathered by Mr. Osborne, all of whom lived in the Osborne home. Mr. Osborne worked during the day as a truck driver. The victim had health concerns because he received a heart transplant as an infant, which required that he take immunosuppressive medications. He was on a low sodium diet. The victim also had serious dental issues which required extensive dental work under general anesthesia after the crimes were discovered. There was evidence that the victim was not allowed by the defendant to eat the same foods as the other members of the family and that the victim was given soup and water as his primary means of nourishment, although there was also evidence that the victim was allowed at times to have other foods. There was evidence that the defendant limited the victim's diet to soup because of his poor dental health. When the authorities went to the Osborne home, there was plenty of food in the home, and no one else in the family, including the three other children, appeared malnourished. The victim's diet was a source of contention between the defendant and Mr. Osborne, and Mr. Osborne sometimes provided food to the victim in a clandestine manner in order to avoid conflict with the defendant. The defendant took the victim to his doctor appointments and communicated with school personnel about the victim. The victim's school attendance was sporadic, and he had never returned to school following a suspension.

On several occasions, the victim left the house in the middle of the night and went to Wal-Mart, where he stole food and other items. After this behavior continued despite the defendant sleeping by the door, the defendant and Mr. Osborne began chaining the victim to the bed frame to restrain him. This would confine the victim to the wood floor next to the bed for long periods of time. Sometimes the victim was clothed only in a "pullup" diaper. The defendant was usually the one who chained the victim, although Mr. Osborne bought the chain, had a key to the locks on the chain, and would sometimes release the victim to go to the bathroom and then reapply the chain. The victim was not always allowed to go to the bathroom when he was chained, and at times he would urinate or soil himself and be left in that condition for long periods of time. The victim was sometimes given a "kindergarten mat" on which to sleep on the floor, and he was not the only child who regularly slept on the floor in the two-bedroom home. The mat was taken from the victim as punishment if he urinated or soiled himself. The defendant sometimes gave the victim very hot or very cold showers when he had "accidents" and then required him to stand naked in front of an air conditioner for thirty to forty-five minutes. The defendant also hit the victim at times.

The victim had some behavioral issues. There was evidence that the victim had hidden a kitchen knife and wanted to kill the defendant and Mr. Osborne. On one occasion, the defendant had awakened to find him standing over her with a knife. The victim had exhibited other troubling behavior in the past, including stealing, throwing a toddler, and drowning a kitten, although the victim claimed the drowning was accidental. Despite these challenges, the defendant did not want to have the victim removed from the home because the family would no longer receive his Social Security check.

The evidence against the defendant and Mr. Osborne was provided by law enforcement officers, Department of Children's Services and school officials, the victim's physicians, the victim,

and the defendant's sister. Neither the defendant nor Mr. Osborne testified, although both made statements to the police. Mr. Osborne said that the defendant told him that a law enforcement officer, a teacher, and friends had all told her that it was acceptable to chain the victim at night. Mr. Osborne admitted in his statement that the defendant had been chaining the victim to the bed and had not been feeding the victim properly. Mr. Osborne told the authorities that he acquiesced in the victim being chained and underfed to avoid conflict with the defendant. He admitted he had seen the defendant physically abuse the victim. The defendant told the authorities that the victim had been causing trouble recently and was "driving her crazy." She denied, however, that she had chained him to the bed. She admitted that he was primarily fed soup and said he had dietary restrictions for sodium and sweets. When the defendant was arrested, she had a key to the lock that was used to chain the victim on a key ring in her purse.

The defense attempted to portray the defendant and Mr. Osborne as concerned, albeit misguided, parents who had done the best they could in a challenging situation. There was evidence that the defendant took the victim to medical appointments, gave him his medications, and communicated frequently with school personnel about him. There was evidence that the defendant had expressed concern to a physician about the victim's poor growth and that it was not unusual for pediatric heart transplant recipients to be smaller than their peers.

The defendant claims on appeal that she was improperly given a maximum sentence for her conviction. We begin our sentencing review with a summary of the evidence presented at the sentencing hearing.

The presentence report contains a statement given by the thirty-year-old defendant in which she expressed her regret for having committed the offense. She stated that she tried to get help with the victim from police, school, and doctors, and that "if I had it to do all over again I would stay on top of things until I got the help I needed." The victim reported to the preparer of the report that he was afraid the defendant and Mr. Osborne would retaliate against him for giving evidence. The report reflects that the defendant dropped out of school in the eighth grade. She had no formal job training or skills but had worked as a housekeeper at a motel before marrying Mr. Osborne at age sixteen. She had been a homemaker since her marriage. She was abused by her father as a child and spent time in foster care. Her three children were ages eight, nine, and twelve. She had a conviction at age 22 for misdemeanor assault.

Kelly Morris testified that she prepared the defendant's and Mrs. Osborne's presentence reports. She said she learned in her investigation that the defendant's and Mr. Osborne's three minor children witnessed the victim's mistreatment. She said the defendant's assault conviction arose from an incident when the defendant threw a baby bottle at Mr. Osborne. She said the defendant's bond had been revoked. She said that the victim's mother did not have custody of him and that the defendant had been taking care of the victim since marrying Mr. Osborne. She had received information from Mr. Osborne that the defendant took anti-depressant medication.

Gloria Daily testified that she had known the Osbornes for about two years and that Mr. Osborne had been her son's "ball coach." She said her son had spent the night at the Osborne home.

When a defendant appeals the length or manner of service of a sentence imposed by the trial court, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d).¹ However, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sent'g Comm'n Cmts. This means if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168.

The state argued, and the trial court found, that the following statutory enhancement factors as listed in Tennessee Code Annotated section 40-35-114 (2006) applied to the defendant:

...

- (2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
- (3) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
- (4) The offense involved more than one (1) victim;
- (5) The victim of the offense was particularly vulnerable because of age or physical or mental disability, including, but not limited to,

¹We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal. The defendant was sentenced after the change in the sentencing laws took effect, but the record does not reflect that the defendant signed a waiver of her ex post facto protections to be sentenced under the amended provisions. See T.C.A. § 40-35-210, Compiler's Notes.

a situation where the defendant delivered or sold a controlled substance to a minor within one thousand feet (1,000') of a public playground, public swimming pool, youth center, video arcade, low income housing project, or church;

(6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(7) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

...

(8) The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community;

...

(11) The defendant had no hesitation about committing a crime when the risk to human life was high;

...

(13) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death or serious bodily injury to a victim or a person other than the intended victim;

...

(16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense[.]

The defendant submitted, and the trial court summarily rejected, the following statutory mitigating factors as listed in Tennessee Code Annotated section 40-35-114:

(2) The defendant acted under strong provocation;

(3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

...

(11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct;

(12) The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime[.]

The defendant also submitted the following mitigating factor, which is classified under the “catch-all” provision of section 40-35-114(13):

The defendant has expressed sincere remorse and acceptance of responsibility for her conduct.

The record reflects that the trial court considered the statutory aggravating circumstances, and at least to the extent that it announced its summary rejection of the mitigating circumstances, considered them as well. However, the trial court did not consider the principles of sentencing as required by the statute. Our review of the defendant’s sentence is de novo without a presumption of correctness.

We note, as well, that the state argued for, and the trial court considered, the sentencing enhancement factors as they are delineated in the Code after the 2005 amendments, despite the fact the defendant’s offense was committed before those amendments. This is evidenced by the fact that the state advocated and the trial court found section 40-35-114(8) relative to failure to comply with the conditions of a sentence involving community release applied to the defendant. That subsection was added in 2005. See generally 2005 Tenn. Pub. Acts ch. 353, § 5. There is no indication in the record that the defendant signed a waiver to be sentenced under the amended sentencing statute. Our review is based upon the pre-2005 version of the Sentencing Reform Act, which properly applies to the defendant’s crime.

The defendant claims for the first time on appeal that the length of her sentence is excessive under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), which holds that any fact other than a prior conviction that is required to enhance a defendant’s sentence must be found by a jury beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. at 489 (2000) (same). We must consider whether the defendant waived the Blakely issue by failing to raise this challenge in the trial court.

The defendant argues that she was sentenced in contravention of Blakely at the May 16, 2006 sentencing hearing because the trial court, rather than a jury, found the statutory enhancement factors. The federal courts have applied Apprendi and Blakely to all cases pending on direct review or not yet final. See United States v. Booker, 543 U.S. 220, 268 (2005). The problem for the

defendant is that both Apprendi and Blakely were decided before her sentencing hearing took place. We conclude that the defendant failed to preserve her Blakely challenge when she did not raise it in the trial court. At the time of the sentencing hearing, the defendant had the benefit of the Supreme Court's ruling in Apprendi and its refining of that rule's parameters in Blakely.

We acknowledge that before the defendant's sentencing, the Tennessee Supreme Court had ruled that Tennessee's sentencing law as it existed before June 7, 2005, did not run afoul of the Sixth Amendment concerns addressed in Blakely. See State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) ("Gomez I"), vacated and remanded by Gomez v. Tennessee, ___ U.S. ___, 127 S. Ct. 1209 (2007). The version of the sentencing law addressed in Gomez was the one under which the defendant should have been sentenced. After the defendant's sentencing, the United States Supreme Court issued Cunningham v. California, ___ U.S. ___, 127 S. Ct. 856 (2007). The Supreme Court then granted certiorari in Gomez v. Tennessee, vacated the judgment, and remanded the case to the Tennessee Supreme Court with instructions to reconsider it in light of Cunningham. Recently, the Tennessee Supreme Court held that in light of the dictates of Cunningham, Tennessee's pre-2005 sentencing statute violated the Sixth Amendment. State v. Gomez, 239 S.W.2d 733 (Tenn. 2007) ("Gomez II").

Although the defendant in the present case might arguably have been misled at the time of her sentencing by the majority opinion of our supreme court in Gomez I, the United States Supreme Court, rather than the Tennessee Supreme Court, is the final arbiter of questions concerning the federal Constitution, and the defendant's Blakely claim should have been raised at her sentencing hearing, Gomez I notwithstanding. As such, our review is limited to whether the trial court committed plain error in sentencing the defendant. Gomez II, 239 S.W.3d at 737. Rule 52(b) of the Tennessee Rules of Criminal Procedure provides:

(b) Plain Error. – When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.

See also T.R.A.P. 36(b). Our supreme court has adopted the factors developed by this court to be considered

when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). In order for this court to reverse the judgment of a trial court, the error must be “of such a great magnitude that it probably changed the outcome of the [proceedings],” and “recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial.” Adkisson, 899 S.W.2d at 642.

In the present case, the transcript reflects that the trial court considered whether enhancement and mitigating factors applied and weighed them in arriving at a sentencing determination. We conclude that a clear and unequivocal rule of law was breached. See Gomez II, 239 S.W.3d at 740-41 (holding that application of enhancement factors other than fact of prior criminal convictions was breach of clear and unequivocal rule of law). We also conclude that substantial rights of the defendant were affected when she was denied her Sixth Amendment right to jury trial. See id. at 741. The record does not reflect waiver for tactical reasons. See id. at 741-42 (allowing plain error consideration where record did not reflect that defendant waived Blakely issue for tactical reasons). Finally, consideration of the issue is necessary to do substantial justice. See id. at 742. The defendant faced a sentencing range of three to six years and was given a maximum, six-year sentence. Her only prior conviction was for misdemeanor assault which occurred eight years before her sentencing in the present case. The state argues that the defendant did not establish this final prerequisite for plain error review because other than the prior criminal convictions, “no reasonable jury would have failed to find the facts beyond a reasonable doubt necessary to support each of these factors.” We note, however, that because our review of the defendant’s sentence in this case is de novo unaccompanied by the presumption of correctness, our task is not reviewing the trial court’s findings of enhancement factors by preponderance of evidence but is to conduct our review without any deference to the trial court’s findings relative to enhancement factors. We hold that plain error review is proper.

The defendant’s sentence is subject to enhancement based upon her prior conviction. However, we must consider the mitigating factors given our de novo review. We reject that the defendant acted under strong provocation. Although the defendant found herself in a difficult situation as the victim’s caregiver, the record belies any argument that the situation or the disabled victim himself strongly provoked the defendant to starve and confine the victim. We likewise reject that substantial grounds exist tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense. The defendant’s actions were so inappropriate and cruel that they cannot be excused or justified, notwithstanding the difficulties in caring for the victim. We cannot accept that the defendant committed the crime under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. She withheld food from the victim and kept him chained for a long period of time. We reject, as well, that the defendant acted under duress or under the domination of another person. The defendant was the victim’s primary caregiver and participated at least equally in his mistreatment. There is no evidence to support a finding that Mr. Osborne or anyone else coerced or forced her to mistreat the victim. We do accept, however, the defendant’s expression of remorse and acceptance of responsibility for her conduct. She gave a lengthy statement in the presentence report in which she acknowledged her wrongdoing and apologized for her crime.

Balancing the applicable mitigating factor and enhancement factor, we arrive at a sentence of three years and six months. We modify the defendant's sentence accordingly.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed as modified.

JOSEPH M. TIPTON, PRESIDING JUDGE